PETITION FOR WRIT OF CERTIORARI.

UNITED STATES CIRCUIT COURT OF APPEALS

OCTOBER TERM, 1902.

No. 457.

DAVID R. JULIAN, SHERIFF, MRS. CLEMMYE JAMES, ADMINISTRATRIX, and MRS. FANNIE HOWARD, ADMINISTRATRIX, Appellants, Petitioners,

against

THE CENTRAL TRUST COMPANY and THE SOUTHERN RAILWAY COMPANY, Appellees, Respondents.

BRIEF FOR PETITIONERS.

A. C. Avery, Lee S. Overman, and C. A. Mountjoy, Solicitors for Petitioners.

SUMMARY OF FACTS.

The facts relied upon to show such conflict in the decisions of the Circuit Court of Appeals for the Fourth Circuit and the decisions of the Supreme Court of North Carolina, as will bring the application for writ of certiorari within the rule laid down in *Forsyth v. Hammond*, 166 W. S., 506, 514, 515, are briefly set forth in the petition for writ of certiorari.

In the year 1899, Mrs. James, administratrix of her deceased husband, W. A. James, brought an action in the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company, for damages for the negligent killing of her intestate, and recovered judgment in said Court for fifteen thousand dollars. The Southern Railway Company was not a party to said

action, but was operating at the time the line of railway between Salisbury and Paint Rock, in said State, and built under authority of the charter of the Western North Carolina Railroad Company, on which plaintiff's intestate was killed; and intestate was then employed by the Southern as a locomotive engineer. From a ruling of the Judge below, that, upon the facts found, the plaintiff was not entitled to recover, the plaintiff, administratrix, appealed to the Supreme Court of North Carolina, when the judgment was reversed and the Court below was directed to enter judgment against the Western North Carolina Railway Company for the amount of damages assessed and costs. (See *James v. Railroad*, 121 N. C., 523.)

The defence relied upon in the State Court was, that the Southern Railway Company, a corporation created by and organized in the State of Virginia, had acquired title to the franchise and property of the Western North Carolina Railroad Company as purchaser under a decree of foreclosure of a second mortgage made by said Western North Carolina Railroad Company, on the 2d day of September, 1884, subject to a first mortgage made by it on the 1st day of September, 1884. (See record, pages 95 and 129.)

The respondents here rely upon the same record of the foreclosure suit in the Circuit Court of Appeals and the decree of the sale, report of sale, and decree of confirmation set up in the State Court, to show that the Western North Carolina Railroad Company was no longer an existing corporation, but that its franchise and property, notwithstanding the outstanding first mortgage, had been acquired by the Southern Railway Company of Virginia.

The Supreme Court of North Carolina held that the Western North Carolina Railroad Company was still an existing domestic corporation of North Carolina, and that under statutes of the State, enacted long before said mortgages were executed, or said sale made, a foreign purchaser was required, as a condition precedent to operating a road

organized under a domestic charter and so sold, to organize as a domestic corporation.

The State Court held that under a settled line of decisions of the State Court, extending back before the execution of said mortgages or sales thereunder, where an existing railway corporation allowed its road to be operated by another company, both companies were liable to answer in damages for injuries caused by the negligence in operating trains so suffered to run.

During the year of 1897 the petitioner, Fannie E. Howard, as administratrix of her husband, John H. Howard (who was fireman on the same engine of which W. A. James was engineer), also brought suit against the Western North Carolina Railway Company for the negligent killing of her intestate, by the same collision which caused the death of James, and recovered, in the Superior Court of said county, judgment for five thousand dollars. By consent of parties, this judgment was to abide the decision of the Supreme Court of North Carolina in *James v. Railroad, supra.*

Upon he coming down of the certificate from the Supreme Court, judgment was entered in favor of the plaintiff, Mrs. James, in the Superior Court of Rowan County, in accordance with the opinion of the appellate Court. During the same term of said Superior Court a creditor's bill was filed by S. T. Pearson *et al.*, who had been stockholders in the Western North Carolina Railroad Company, before the company was reorganized in 1880, or issued its first mortgage bonds, on the 1st day of September, 1884, or its second mortgage bonds, to enforce the payment of which the foreclosure suit was brought, on the 2d of September, 1884. (See pages 95 and 127 of the printed record.) The plaintiff, Pearson, and other stockholders, were seeking to go behind the foreclosure decrees, and invited creditors of the Western North Carolina Railroad Company to join in asking for a receiver for said company, to take charge of its property, then in the hands of the Southern Railway Com-

pany, and which could not otherwise be subjected to the payments of its debts. The said Superior Court made an order requiring said Western North Carolina Railroad Company (which had answered in said actions brought by James, administratrix, and Howard, administratrix, by its President, A. B. Andrews), to show cause why a receiver should not be appointed. Thereupon the Central Trust Company of New York and the Southern Railway Company, as purchaser under said foreclosure decree, filed a supplemental bill entitled as of said foreclosure suit, asking to enjoin the plaintiffs in said creditor's bill filed in the Superior Court of Rowan County from proceeding further in their said action, on the ground that said plaintiffs were estopped by said decree of foreclosure. (See record, pages 108 to 123.) Upon the hearing of supplemental bill before Judge Simonton, in the Circuit Court for the Western District of North Carolina, the temporary restraining order previously granted by him was made perpetual (see printed record, page 181), and the respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, at Richmond. (See decree of the Circuit Court and opinion of Simonton, Judge, printed record, page 181 and omitted by consent, see page 198.) The said Circuit Court of Appeals affirmed the judgment of the Circuit Court in so far as it restrained the old stockholders, S. T. Pearson and others, from further proceeding in the State Court to enforce their demands, and, in so far as it restrained Mrs. James and Mrs. Howard from further prosecuting said creditor's bill (on the ground that the gravamen of the bill was the relief sought by the old stockholders who were estopped by the foreclosure decree, being represented by the directors of their company as parties); but said Court of Appeals held that the said decree granted by Simonton in the Circuit Court should be so modified as to leave Mrs. James and Mrs. Howard, who were not parties to said foreclosure suit, at liberty to proceed, as they might be advised to enforce their judgments obtained in the Superior

Court of Rowan County. (See decree and mandate of said Circuit Court of Appeals, pages 34 and ..., and opinion, pages 194 to 198, of printed record; 98 Fed. R., 489.)

Upon the going down of the mandate to said Circuit Court a decree was entered in said Court, by Judge Hewart, so modifying the former decree made by Judge Simonton, as to leave Mrs. James and Mrs. Howard, at liberty to proceed in any action other than said creditor's bill, as they might be advised, to collect their judgments in the State Court. (See printed record, near bottom of page 197.)

Subsequently the appellees (the respondents here) filed a petition for mandamus in said Circuit Court of Appeals to compel the Circuit Court below to so modify the said decree as to declare that the said Mrs. James and Mrs. Howard were estopped from denying the title of the Southern Railway Company acquired by said purchase under said foreclosure decree; but said Circuit Court of Appeals refused to grant said writ. (See pages ... and... of printed record.)

Subsequently, the Supreme Court of North Carolina held (*Railroad v. Burnett*, 123 N. C., 2 0, 131 S. E. R., 602; *Williams v. Railway Co.*, 126 N. C., 918), that the remedy of plaintiffs who recover judgments against corporation for damage for negligence must be enforced, if at all, by levying upon the franchise and property of corporation, the statute (The Code, Sec. 1255, Act of 1879, Chap. 101) having provided that no mortgage executed by a corporation should be deemed a lien upon its franchise and property, as against such after acquired judgment for damages for negligently injuring persons or property. In conformity to these rulings of the State Court, Mrs. James and Mrs. Howard caused to be issued from the Superior Court of Rowan County executions on their said judgments (see pages 57 and 59 of printed record), and placed said executions in the hands of the petitioner, D. R. Julian, Sheriff of Rowan County, who, under the instructions of Mrs.

James and Mrs. Howard, levied said executions upon the franchise and property of the Western North Carolina Railroad Company, the State of North Carolina having provided that executions against such corporations should be levied upon the franchise and property.

The respondents, Central Trust Company, of New York, and the Southern Railway Company, thereupon filed another supplemental bill, entitled as of said foreclosure suit against the petitioner, D. R. Julian, Sheriff, and a temporary restraining order was granted by Judge Boyd, of the Circuit Court of the Western District of North Carolina, a few days before the time appointed to sell said franchise. (See pages ... and 3 of printed record.) No notice of the filing of said bill or order was given to the petitioners, Clemmye James, administratrix, or Fannie E. Howard, administratrix, who are both residents of the Western District of North Carolina.

Upon the return of the order to show cause why said injunction should not be made perpetual, the petitioner, Julian, filed a written motion to dismiss, on the ground that an injunction did not lie against him, without joining the plaintiffs in execution, he being their agent. The motion was refused and petitioner, Julian, excepted. (See printed record, pages 9 and 8.) He thereupon filed his answer. (See page 4 of record.)

The petitioners, James, administratrix, and Howard, administratrix, thereupon entered a special appearance, and moved to dismiss the bill, on the ground that the bill and order had been served only upon said Julian. The said motion was refused; the petitioners, James and Howard, excepted (see pages 6 and 9 of record), and said petitioners thereupon filed their answer. (See page 9 of record.)

Upon the hearing of the bill, answer and proof offered the Court continued the injunction, and from its decree the petitioners appealed to the Circuit Court of Appeals for the Fourth Circuit. (See pages 3, 42, 9 of record.)

The said Circuit Court of Appeals, at its session at

Charleston, filed its decision, affirming the decree of said Circuit Court of Appeals, rendered by Judge Boyd, at Greensboro, and, as petitioners contend, overruling its former decision in said case, upon appeal from Judge Simonton, as Circuit Judge. (See opinion of the Circuit Court of Appeals, filed for the Court by Judge Simonton, and the decree, pages 194 and 199 of printed record.)

There is a conflict of opinion, which is unseemly, and which can not be settled except by the Supreme Court.

The Supreme Court of North Carolina said, in *James v. Railroad*, 121 N. C., at page 529:

"*But the old corporation still in existence* is liable for damages by the maladministration of the "Southern," which is allowed to run and operate the road. *But the property of this road, which the "Southern" is allowed to use, will be held liable to the public for damages.*"

Judge Simonton, in the opinion, says, for the Court of Appeals (at page ... of record), referring to the Western North Carolina Railroad Company: "It did not have, on 21st February, 1898 (the day on which the judgment, upon which the execution complaint of in this case (in *James v. Railway, supra*) was rendered), any *interest, right, estate or property in the road levied upon, or in its equipment, rolling stock, franchise, or property of any description. All of these had become and were vested in the Southern Railway Company*, the purchasers under the decree of the Circuit Court of the United States for the Western District of North Carolina. *The Sheriff under this precept had no right to levy upon and advertise the same for sale.*"

On the other hand, the Supreme Court of North Carolina, in *Railroad v. Burnett*, 123 N. C., 210, 213, 214, 215, construed, in its applications to cases of this kind, The Code, Sec. 1255, Act of 1879, Chap. 101, which was enacted more than five years before the first mortgage of the Western North Carolina Railroad Company, which is still outstanding, was executed on the 1st of September, or the second mortgage, which was foreclosed on the 2d of Septem-

ber, 1884, is as follows: "Mortgages of incorporated companies, upon their property or earnings, whether in bonds or otherwise, hereafter issued, *shall not have power to exempt the property or earnings of such incorporations from execution for* the satisfaction of any judgment obtained in Courts of the State against such incorporation, for labor performed, nor for material furnished such corporation, *nor for torts committed by such incorporation, its agent or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.*"

The Court held in that case that mortgages of incorporated companies did not exempt their property from judgments obtained in the Courts of the State against them for labor performed, nor for torts committed, and that it made no difference whether the mortgaged property was sold before or after the judgment, where the purchaser took with notice.

The Court held that the *mortgage contract was entered into* by the mortgagee *in contemplation of the Act of 1879, and said act was, therefore, written into the contract.*

"The principle underlying this decision and upon which it is decided is, *that under Section 1255 of The Code the mortgage conveyed nothing as against this claim; and, as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale.*"

Railroad v. Burnett, at page 215.

"*Another ground the plaintiff takes is, that the mortgaged property was sold under a decree of the Circuit Court of the United States, having jurisdiction of the matter and the power to foreclose the mortgage and to make an order of sale. This is not disputed. But the defendant was not a party to that suit, and no rights that the defendant Burnett had are affected by this decree and order of sale.* Therefore, the fact that *the plaintiff* claims under a sale, made under a decree of foreclosure and order of

Court, does not affect the rights of the defendant Burnett. *The order was based on the mortgage and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage, under a power of sale contained in the mortgage.*"

Railroad v. Burnett, at pages 214, 215.
Howe v. Harper, 127 N. C., at pages 357, 358.

In *Williams v. Railway Company*, 126 N. C., 918, 920, 921, the Court, after quoting the passages above set forth, said:

"The intervenor here was not a party to the foreclosure proceeding and did not seek to be made a party till after the sale had been made under it. The purchaser stands in the shoes of the original debtor, bought only such interest as he could mortgage as against the Falls of Neuse Manufacturing Company, and has no right to share in the proceeds of such sale. *It must proceed against its debtor and assert its rights by execution against the property, notwithstanding the foreclosure sale, just as was held in Railroad v. Burnett, supra.*

But here, as in Railroad v. Burnett, the judgment for tort was obtained after the sale under foreclosure, and after the property was turned over to the purchaser, and there was no obstruction of the petitioner's execution by any action of the Court; as to it, the mortgage and any rights obtained under it, either by bondholders or purchasers, are non-existent. Hancock v. Wooten, 107 N. C., 9, which holds that in a creditor's bill the creditors uniting in the action to set aside a fraudulent assignment acquire a preference by way of an equitable lien, has no application in this case. *Goldberg v. Cohen*, 119 N. C., 68."

The Supreme Court of North Carolina held that the legal title to the franchise and property of the Western North Carolina Railroad Company was still vested in the Central Trust Company after the sale, and that while the

Southern Railway Company had become bound to see that debt discharged, the power was still lodged in the Central Trust Company to foreclosure the first mortgage if the Southern should fail to pay accruing interest on the first mortgage bond or the principal at maturity.

The language of the Court in *James v. Railroad*, at page 527, is as follows:

"*At the time the second mortgage was executed, the legal title to this property was in the Central Trust Company, of New York, having been conveyed to this company by the first mortgage, and the Western North Carolina Railroad Company had only the equity of redemption when it executed the second mortgage, and only the equity of redemption at the time of said sale. And as the Southern Railway Company claims under the second mortgage, it can have no more, no greater estate, than the Western North Carolina Railroad Company had at the date of the sale under the second mortgage.*"

By the sale of the special master under the second mortgage, the purchase *thereunder and the express assumption of the first mortgage debt binds the purchaser, the Southern Railway Company, for this debt.* And as between the Southern and Western, it makes the Southern the principal and the Western its surety. But this does not release *the "Western nor the property mortgaged to pay the debt from liability.* And this, *it seems to us, would be a reason for not considering the Western North Carolina Railroad Company as extinct. Woodcock v. Bostic*, 118 N. C., 823; *Keller v. Ashford*, 133 U. S., 610."

Upon the same question Judge Simonton, for the Court, said, in its last opinion (see page ... of record):

"The purchaser was put into possession. To all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing the *Southern Railway Company as the owner of the equity of redemption and as the party liable for the payment of the bonds first issued under*

the first mortgage. It thus appears that the Western North Carolina Railroad Company, originally the owner of this property, with authority to alien, sell or mortgage the same, then the mortgagor, then the owner of the equity of redemption, its only means of procuring release of the mortgage, then the mortgagor of this equity of redemption, by a decree of a Court of competent jurisdiction, in a suit to which it was a party appearing and answering, was forever debarred and foreclosed of all right and equity therein, including this equity of redemption."

The Code of North Carolina prescribes how sales of corporations, "authorized to receive fare and tolls," shall be made as follows:

"Section 671. If any judgment or decree shall be rendered against a corporation, the plaintiff may sue out such execution against the property of a corporation as is provided in this Code to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation; and *if the judgment or decree be against any corporation authorized to receive fare or tolls,* the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold under the rules regulating the sale of real estate.

"Section 672. When an execution has been sued out and levied upon the personal property of a corporation, such personal property may be sold, and the title to such property shall pass to the purchaser at said sale, independent of the franchise and real estate of such corporation.

"Section 673. In the sale of the franchise of any corporation, the person who shall satisfy the execution with all costs thereon, or who shall agree to take such franchise for the shortest period of time, and to receive during that time all such fare and toll as the said corporation would by law

be entitled to demand, shall be considered as the highest bidder.

"Section 674. The officer making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; and the officer shall, immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise belonging to such corporation, in whatever county the same may be situated, and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase in the same manner and under the same regulations as such corporation was before authorized to demand and receive the same.

"Section 676. The corporation whose franchise shall have been sold as aforesaid shall, in all other respects, retain the same power and be bound to the discharge of the same duties and liable to the same penalties and forfeitures as before such sale."

Construing the foregoing, in 1859, the Court held that the purchaser at such sale would be such person as offered, first, to pay the debt; second, to take the fare and toll in satisfaction for payment for the shortest period, it being permissible to bid for the whole period of corporate executive, or any less term of years.

Taylor v. Jenkins, 51 N. C., at page 320.

By reference to the record, pages 55, 57, it will appear that the petitioner, Julian, was proceeding to sell the franchise, in the manner indicated in *Taylor v. Jenkins, supra,* under the Act of 1820, as amended, and was acting under *Railroad v. Burnett,* and other cases cited above, which declared that the judgment must be enforced by sale of the franchise and property under the execution.

Judge Simonton, in the opinion, says:

"The act of the Sheriff in levying on this property clearly

was illegal" (record, page 205), whereas, the Supreme Court of North Carolina said the corporation, the Western North Carolina Railroad Company, was still in existence, and its franchise (which was the soul of this artificial person, sometimes called "soulless"), and property were still liable for the satisfaction of these very judgments.

The State Court pointed out the duty of the sheriff, as to what to sell and how to sell it; but when he attempted to follow its decision, as directed by the State Court, the Federal Court declared that he went "outside of his official duty and was a bald trespasser." (See printed record, pages 206, 204.) The Supreme Court Of The State Adheres To Its Opinion in *James v. Railroad, supra,* And Speaking Of That Decision At The August Term, 1901, Said,

"We can only say that we reaffirm that case in every essential particular. We are of opinion that the Western North Carolina Railroad Company still exists under its charter as a North Carolina corporation. If it does not so exist, then it has no legal existence whatever; and grave questions must arise as to the illegal use of its franchise and the tenure of its easement.

While we are of the opinion that the construction of the statutes of this State is peculiarly within our jurisdiction, and especially those creating corporations which have no natural right of existence, we do not think that the case of James v. Central Trust Company, 98 Fed. Rep., 489, tends to sustain any doctrine inconsistent with those laid down by us in the James Case.

Perry v. Railroad, 129 N. C., at pages 334, 335.
Mowery v. Railroad, 129 N. C., at page 354.

The Court adheres to the decision in Logan v. Railroad, 116 N. C., 940 (see discussion of the case in Harden v. Railroad, 129 N. C., at pages 356, 357, 359, 361 to 363), and the following in Perry v. Railroad, 129 N. C., at page 335:

"If this exception is intended to raise the question of the liability of the lessor, we can only repeat what we said before, 'That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road, is well settled in this State.'

Aycock v. Railroad, 89 N. C., 321, 330.
Logan v. Railroad, 116 N. C., 940.
Tillett v. Railroad, 118 N. C., 1031, 1043.
James v. Railroad, 121 N. C., 523, 528.
Benton v. Railroad, 122 N. C., 1007, 1009.
Norton v. Railroad, 122 N. C., 910, 937.
Pierce v. Railroad, 124 N. C., 83, 93.
Perry v. Railroad, 128 N. C., 471, 473.
Raleigh v. Railroad, and Harden v. Railroad, at this term."

THE CIRCUIT COURT ERRED IN REFUSING TO DISMISS FOR WANT OF SERVICE ON PROPER PARTIES, WITHOUT REGARD TO THE MERITS OF THE DEFENCE, AND THE COURT OF APPEALS ERRED IN FAILING TO SUSTAIN THE EXCEPTION TO THE RULING BELOW. THE PETITIONERS WISH TO HAVE THE CAUSE DECIDED UPON THE QUESTION OF JURISDICTION BY THE SUPREME COURT, BUT CONTEND THAT THEY ARE ENTITLED TO RECOVER COST, IN ANY EVENT, FOR SAID ERROR.

The old Court of Equity of North Carolina uniformly held, as has since been the settled rule under the new procedure that a sheriff who levies an execution, being the mere agent of the plaintiff and presumed to sell, or refrain from selling, under the direction of the plaintiff, is not a proper party-defendant in a suit brought to restrain him from selling thereunder, and that a bill, asking such relief as to such sheriff, must be dismissed with costs as to him. The Court erred in refusing to dismiss as to him. (See printed record, page 9.)

Edney v. King (4 Ired. Eq., 465); (39 N. C., 465).
Lackey v. Curtis, 6 Ired. Eq., 199 (41 N. C., 199).
McLean v. Manning, Winston Eq. (60 N. C., 668).

Where the sheriff is allowed to be made a party, for the sake of giving him notice, it seems to be the universal rule that he is merely a nominal party and no relief can be granted against him.

10 Enc. of Pl. and Pr., p. 916, and note 1.

Though the Sheriff was the agent of the plaintiffs in execution, in the sense that he was presumed to levy and sell, or refrain from selling, under their direction, there is no common law rule and no statutory provision, which makes service of any process upon him sufficient to bring the plaintiffs in execution before the Court. This proposition is elementary, and needs no citation of authority to sustain it. When the petitioners, James and Howard, entered a special appearance, the motion to dismiss the bill ought to have been alowed. (See printed record, pp. 9 and 8.)

THE QUESTION OF JURISDICTION.

THE BURDEN RESTS UPON THE RESPONDENTS TO BRING THEIR CLAIM TO RELIEF UNDER SOME RECOGNIZED EXCEPTION TO THE GENERAL RULE EMBODIED IN SECTION 720 OF THE REVISED STATUTES OF THE UNITED STATES.

"The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It is not pretended that this injunction is authorized by any law relating to bankruptcy. It will not be denied

that Congress had the power to prescribe limits to the jurisdiction of its creatures, the Federal Courts. Congress has declared, in the section quoted above, that "*The writ of injunction shall not be granted* by any Court of the United States to stay proceedings," etc., except as authorized in bankrupt laws. The mandatory phohibition could not be couched in plainer or more unmistakable language.

It is not denied that the Circuit Court of the Western District of North Carolina is a Court of the United States.

It is acknowledged that this Court has granted a writ of injunction to stay proceedings in the Superior Court of Rowan County, to-wit, to restrain the Sheriff of Rowan County from proceeding to sell property levied upon by him and advertised to be sold by virtue of an execution issuing from said Court.

It is admitted that the Superior Court of Rowan County is a "Court of a State."

The momentous question, whether the Circuit Court had exceeded the plainly prescribed limits of its jurisdiction, was disposed of in the opinion of the Circuit Court of Appeals, without citing a single authority, in one short paragraph and as a matter of minor importance remaining, as follows:

"The only remaining question is, can the Circuit Court of the United States interfere with this State officer, or is it precluded by the provisions of section 720 of the Revised Statutes of the United States? It will be observed that no question is made upon the validity of the judgment of James, administratrix, and of Howard, administratrix, in the State Court. We do not sit to review these judgments, nor have we the right to do so. The case made shows that Julian, the sheriff, is attempting to sell for the satisfaction of judgments against the Western North Carolina Railroad Company, property in which that company has no interest or estate whatsoever. He has been enjoined, not from or because of the use of process, but

because of the abuse of process. When he seeks to subject the property of the Southern Railway Company, by levying upon it under a judgment to which it was not a party, for the payment of the judgment against the Western North Carolina Railroad Company, he goes outside of his official duty, and becomes a bold trespasser."

The petitioners contended before the Circuit Court of Appeals, *that it had been repeatedly held, that a Federal* Court could not enjoin service of process issued by a State Court or the enforcement of the judgment of a State Court or restrain sales of property by virtue of executions issued on a judgment of a State Court, and that the prohibition of section 720, Revised Statutes, extended both to attempts of Federal Courts to restrain the issuing of process and its execution by officers of the State Court.

Sargent v. Helton, 115 U. S.

Haines v. Carpenter, 91 U. S., 284.

Dial v. Reynolds, 96 U. S., 340 (cited in the opinion of Morris, Judge, 98 Fed. Rep., 489).

THE QUESTION OF JURISDICTION WAS TREATED BY JUDGE MORRIS, 98 FED. REP., 489, AS THE MAIN QUESTION WHICH CONFRONTED THE COURT AT THE THRESHOLD OF ITS EXAMINATION, AND THE COURT THERE CONCLUDED THAT THE PROHIBITION OF SECTION 720 COULD ONLY BE EVADED BY SHOWING THAT MRS. JAMES AND MRS. HOWARD WERE PARTIES TO OR BOUND AS PRIVIES BY THE JUDGMENT IN THE FORECLOSURE SUIT.

The Court said in its opinion, 98 Fed. Rep., 489:

"Neither Mrs. James nor Mrs. Howard could be said, we think, to be in any sense a party to the foreclosure suit or bound by it. Whatever rights they have accrued to them three years after the sale and had no connection whatever with the rights that were adjudicated by the decree. It may be, notwithstanding anything adjudicated by the decree, that under the laws of North Carolina the

Western North Carolina Railroad Company was answerable to them for damages, for which they obtained their judgment, and the railroad, now in possession of the Southern Railway Company, also liable. *These are questions not litigated in the foreclosure suit, and which the appellees, in our judgment, could not by this supplementary and ancillary proceedings compel Mrs. James and Mrs. Howard to bring before the Circuit Court.*"

In the concluding clause of the opinion the Court held and directed that:

"*The decree should be so modified as not to prohibit Mrs. James and Mrs. Howard from proceeding as they may be advised with any other suit not based upon the supposed rights of the stockholders.*" (See printed record, bottom of page 197.)

THE COURT OF APPEALS CORRECTLY DECIDED IN THE SAME CASE 98 FED. REP., 489, THAT MRS. JAMES AND MRS. HOWARD WERE NEITHER PARTIES NOR PRIVIES TO THE FORECLOSURE SUIT, AND, NOT BEING ESTOPPED BY THE FORECLOSURE DECREE, WERE PROTECTED IN PROCEEDING TO ENFORCE THE COLLECTION OF THEIR JUDGMENTS, BY SECTION 720. THE COURT, IN ITS LAST DECISION, OVERRULES ITS FORMER DECISION WITHOUT DISCUSSION, AND, IN EFFECT, AFFIRMS THE CIRCUIT COURT JUDGMENT, WHICH IT HAD FORMERLY MODIFIED, SO AS TO LEAVE MRS. JAMES AND MRS. HOWARD AT LIBERTY TO PROCEED, AS THEY MIGHT BE ADVISED, TO ENFORCE THE COLLECTION OF THEIR JUDGMENTS.

The disregard of the prohibition contained in section 720 by a Federal Court is judicial usurpation, unless Mrs. James and Mrs. Howard were either parties to the foreclosure decree, or are now in privity with the Western North Carolina Railroad Company, by reason of claiming by, through or under said company. The Circuit Court

of Appeals intimates, that Mrs. James and Mrs. Howard are estopped, but nowhere so declares in plain terms. In its last opinion, the Court of Appeals said:

"It was insisted upon, in argument, that the Southern Railway Company, being a corporation of the State of Virginia,can not *hold railroad property in North Carolina. This question can not arise in this decision.* Whatever may be the law in this regard, the title of the Southern Railway Company can not be *disputed by the Western North Carolina Railroad Company or any person claiming by, through or under it.* The decree of the Circuit Court of the United States for the *Western District of North Carolina, confirming the sale in a cause to which the* Western North Carolina Railroad Company was a party, estops it."

What are *contentions* Of The Southern On The One Part And The Plaintiffs James and Howard On The Other?

The claim of the Southern Railway Company, as stated by Judge Simonton, is, that it became the purchaser under a deed executed and recorded, in pursuance of the decree of foreclosure, the sale and decree of confirmation, and that, "to all these proceedings the Central Trust Company, holder of the first mortgage, was a party, moving for and assenting to all the decrees therein, recognizing *the Southern Railway Company as the owner of the equity of redemption and as the party liable for the payment of the bonds* first issued under the first mortgage."

Mrs. James and Mrs. Howard contend:

That the assent of the Central Trust Company, the trustee with power of sale in both the first and second mortgages, to the decree of foreclosure under the second mortgage, and expressly subject to its lien, did not relieve said Trust Company if its obligation to sell the franchise and property, at the instance of any of the holders of the first mortgage bonds, for default in the payment of interest or principal at maturity, even though the trustee did

recognize the Southern Railway Company as the owner of the equity of redemption, and as a party liable for the payment of the bonds first issued under the first mortgage. The holders of the first mortgage bonds, amounting to $3,856,000 (see record, page 128), expressly refused to agree to surrender their prior lien if they were consulted, though they are not parties to the suit and are not bound by the decree, for it appears (see pages 113, 116, 120, 124 and 129), that, in the decree of sale, order of sale, advertisement of the property by the master, report of sale and decree confirming sale, at every stage of the proceeding, the rights of the holders of the first mortgage bonds were studiously protected by reserving, in the sale under the second mortgage, their superior lien. How, then, could the Court of Appeals jump to the conclusion that the Southern Railway Company was accepted as pay master and that lien was discharged?

If the lien was not discharged, then the trustee may be called upon to foreclose for default in the payment of the principal of the first mortgage bonds at maturity, in 1814, or for failure to meet interest before maturity. Neither the promise of the Southern Railway Company, nor the promise of any other capitalist, recognized in the orders in a suit in equity, will discharge an existing first lien, recognized in the very same orders and reserved.

What would the Central Trust Company sell, if called upon in case of default, to satisfy the lien of the first mortgage bonds?

Clearly it would sell what was mortgaged and that upon which the lien was reserved. If so it would sell the franchise, and the franchise could not be sold unless it existed. As long as the franchise exists, subject to such lien, a North Carolina corporation exists, and, so long as it exists, the lien of the first mortgage is no lien against a judgment for tort, under a statute, existing when the mortgage debt was contracted, and the mortgage security accepted subject to its provisions.

Railroad v. Burnett, and authorities cited, *supra*.
The Code of N. C., section 1255, quoted, *supra*.

"These opinions are expressly put upon the ground that the mortgages were void as to such claims and that the property stood, so far as such claims are concerned, just as if no mortgage had been made."

Railroad v. Burnett, 123 N. C., at page 214.

If the defendants in the foreclosure suit, the Richmond and Danville Railroad Company, the lessee then operating the lien of the mortgaged company, and the Western North Carolina Railroad Company, managed, before and after being placed in the hands of a receiver, to meet the interest, as it accrued, on the first mortgage bonds, so as to prevent a default as to them, the plaintiff, trustee, the Central Trust Company, had a right to agree that the foreclosure and sale should be subject to the lien of the first mortgage. They had a right to agree in addition, by a consent decree, that the Southern should be deemed responsible for the debt. But they could not reserve the lien then, and say now, that it was discharged by the simple promise of the Southern to pay.

THE PETITIONERS INSIST THAT THE SUPPLEMENTAL BILL BE DISMISSED AND THE INJUNCTION DISSOLVED, BECAUSE THE PETITIONERS, NOT BEING PARTIES OR PRIVIES TO THE FORECLOSURE SUIT, CAN NOT LIKE A STOCKHOLDER REPRESENTED IN THE SUIT BY THE DIRECTORS OF HIS COMPANY, BE DEEMED CONCLUDED BY THE DECREE.

ROOT VERSUS WOOLWORTH, 150 U. S., 401, IS NOT IN POINT.

Because there the party enjoined, in the ancillary or supplemental proceeding, was the party whose interest in the very property in controversy was adjudicated under the

original bill, and the party, at whose instance he was enjoined, was the assignee of the complainant, who obtained the original decree or judgment determining the title to the land in controversy, and, being in privity with the original claimant, had the right, by a supplemental decree in equity in the nature of a writ of assistance at law, to enjoin the original defendant and those in privity with him from disputing a judgment, which bound them as parties or privies.

Root v. Woolworth, *supra,* can not govern a case (though cited in the decision by Judge Simonton) where parties, like Mrs. James and Mrs. Howard, claim adversely, and not under the party, whose property they seek to subject. They come before the Federal Court, insisting, as they did in the State Courts, that the first mortgage lien is still outstanding against all others, but not against them, and that they have a right to still further proceed against the defendant in execution (not under said defendant), and sell its franchise and property. Was it ever held before in any Court that a party, holding a judgment and issuing execution thereon and levying upon the property of the judgment debtor, was estopped, as a claimant under the debtor, by a decree, to which the debtor but not the creditor, was a party? It is a ruling evolved, since Judge Morris, speaking for the same Court, stated as a proposition, self evident upon a review of the record, that Mrs. James and Mrs. Howard, being neither parties nor privies, were not estopped by the foreclosure decree.

In James *et al.* v. The Central Trust Company *et al.*, 98 Fed. Rep., 489 (printed record, page 196), Judge Morris, for the Court, said:

"The rule that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to the proceedings (DuPassuer v. Rocheran, 21 Wall., 130-135), has been applied by the Supreme Court of the United States to a foreclosure sale of telegraph lines (United

Lines of Telegraph Co. v. Boston, etc., Trust Co., 147 U. S., 431-448), and to a foreclosure sale of a railroad. Pittsburg, etc., Railroad v. Loan and Trust Co., 172 U. S., 493-515.)

Neither Mrs. James nor Mrs. Howard could be said, we think, to *have been in any sense a party to, or claiming under any party to the foreclosure suit or bound by it.* Whatever rights they have accrued to them three years after the sale, and had no connection whatever with the rights which were adjudicated by the decree. *It may be, notwithstanding anything adjudicated by that decree, that under the laws of North Carolina the Western North Carolina Railroad Company was answerable to them for the damages for which they obtained their judgments, and the railroad, now in possession of the "Southern Railway Company, also liable."*

NO CASE IS CITED IN THE LAST OPINION OF THE CIRCUIT COURT OF APPEALS WHERE A PERSON, NATURAL OR ARTIFICIAL, WHO WAS NEITHER A PARTY NOR A PRIVY TO A SUIT IN EQUITY WHEREIN A FINAL DECREE WAS ENTERED IN A CIRCUIT COURT OF THE UNITED STATES, HAS BEEN MADE A PARTY BY SUPPLEMENTAL BILL AND HELD TO HAVE BEEN ESTOPPED BY SUCH FINAL DECREE IN THE ORIGINAL PROCEEDING.

In maintaining that section 720 of the Revised Statute does not operate to prohibit issuing injunctions, in the nature of writs of assistance at law, against persons who are neither parties to nor in privity with any party to the original suit, the decision brought up for review is unique. If such doctrine can be sustained, it is in vain for Congress to erect barriers that can not be torn down by "*Judge-made*" law.

THE NORTH CAROLINA DECISIONS MIGHT HAVE BEEN REVIEWED BY WRIT OF ERROR IN

THIS COURT, AS POINTED OUT IN THE OPINION OF JUDGE MORRIS, 98 FED. REP., 489.

By reference to the record (pages 27, 71 and 84) it will appear that A. B. Andrews, Vice-President of the "Southern," verified the answers of the Western North Carolina Railroad Company in the suits brought against it by the petitioners, and that the counsel of the "Southern" appeared for the "Western North Carolina." Yet they would not ask for a writ of error, nor would the "Southern" assert its rights by organizing as a domestic corporation in the way pointed out by the Supreme Court of North Carolina.

In James v. Railroad, 121 N. C., at pages 528, 529, the Supreme Court said:

"The corporation is an entity, resting upon a grant of the sovereign and clothed with some portion of the sovereignty. A railroad corporation is quasi public, and these extraordinary powers—franchise—are supposed to be granted for the benefit of the people as well as for the benefit of the corporators. It is presumed, by the acceptance of the franchise, that the corporators accept it subject to its burdens. This being so, it can not be that the corporation could sell and transfer this franchise (this sovereignty) without the express permission of the sovereign (the Legislature) to do so. Logan v. Railroad Company, 116 N. C., 940; Railroad Co. v. Winans, 17 How., 30."

It is claimed by the "Southern" that this express authority is given by section 687 and 698 of The Code. These sections were passed in 1872, and we think should be considered in connection with section 701, which was passed in 1879, and sections 1936 and 2005, referred to in section 701.

If this be the correct reading of these sections of The Code, it would seem that while section 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in section 1936 of The

Code, to take its place before it is dissolved; that there must always be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise; and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation.

THE SECTIONS OF THE CODE REFERRED TO ABOVE AND CONSTRUED TOGETHER IN THE OPINION OF THE COURT, AS REQUIRING THE PURCHASER AT A FORECLOSURE SALE TO ORGANIZE A NEW NORTH CAROLINA CORPORATION, ARE AS FOLLOWS:

"Sec. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyent shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him recorded, in the same manner in which the conveyance shall be recorded.

"Sec. 698. The corporation created by, or in consequence of such sale and conveyance, shall succeed to all such franchise, rights and privileges, and perform all such duties as would have been, or should have been, performed by the first corporation, but for such sale and conveyance, save only that the corporation so created, shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts of, or claims against, the first

corporation, which may not be expressly assumed in the contract of purchase; nor shall the property, franchise or profits of such new corporations be exempt from taxation. And that the whole profits of the business done by such corporations shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding the amount of the stock in the first corporation at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper. And when a corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.

"Sec. 701. This chapter, unless otherwise declared herein, or in the chapter entitled Railroads and Telegraphs, shall apply to all corporations, whether created by special act of Assembly, by letters of agreement under this chapter, or by the chapter entitled Railroads and Telegraphs. And this chapter and the chapter on Railroads and Telegraphs, so far as the same are applicable to railroad corporations, shall govern and control anything in the special act of Assembly to the contrary notwithstanding, unless in the act of the General Assembly creating the corporation the section or sections of this chapter, and of the chapter

entitled "Railroad and Telegraph Companies," intended to be repealed, shall be specially referred to by number, and as such specially repealed.

"Sec. 1936. There shall be a board of six directors and a president of every corporation formed under this chapter to manage its affairs; and said directors and president shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any Court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge *and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation, with all the powers, privileges and franchise, and be subject to all the provisions of this chapter.*

"Sec. 2005. When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchise and profits of said new corporation shall be taxed as other like property, franchise and profits are taxed."

THE MORTGAGEES HAD CONSTRUCTIVE NOTICE OF PRIOR RULINGS OF THE SUPREME COURT.

At the October Term, 1883, nearly a year before the execution of the first mortgage bonds, on September 1, 1884, the Supreme Court of North Carolina said:

"The cases cited in the well-prepared brief of the plaintiff's counsel fully sustain the proposition that the defendant company, *leasing the use of its road, or permitting the use of it by another company*, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injury thence resulting, to the same extent as if such mismanagement was the act or neglect of its own servants operating its own train. Railroad v. Barron, 5 Wall., 90; Railroad v. Mayes, 15 Am. Rep., 678; Abbott v. Railroad, 36 Am. Rep., 572; Railroad v. Salvaint, 23 Am. Rep., 214; Pierce v. Railroad, *Ib.*, 283."

"On March 7, 1899, the Court filed its opinion in Pierce v. Railroad. The first paragraph of the opinion is as follows:

"Clark, J. The motion to dismiss the complaint and for judgment of nonsuit appears from brief of defendant's counsel to be intended to raise again the question whether the lessor company, the North Carolina Railroad Company, the defendant herein, is liable for all acts done by the lessee in the operation of the road, as was held in Logan v. Railroad, 116 N. C., 940, but why the counsel should feel encouraged to believe that this Court will retire from the position it has taken upon this question, we

are not advised. We have perceived no lack of soundness of reasoning therein. The decision in Logan's case was made after full deliberation and with full appreciation and careful discussion of the important principles now again called in question, and it was held that *a railroad company can not escape its responsibility for negligence by leasing its road to another company, unless its charter or a subsequent act* of the Legislature specially exempts it from liability in such case, and it was made in an action to which the appellant herein was the party raising the question. The same proposition has been theretofore laid down by Smith, C. J., in Aycock v. Railroad, 89 N. C., at page 330, with cases there cited, and Logan's case upon this point has been expressly cited and sustained in Tillet v. Railroad, 118 N. C., at page 1043; James v. Railroad, 121 N. C., page 528; Benton v. Railroad, 122 N. C., 1007 (decided May 24, last), and Norton v. Railroad, same volume, at pages 936, 937. In the last two cases this point was again held against the same corporation, which is the appellant in this case; the verdicts were for considerable sums, and in Norton's case the defendant was represented by the same counsel as in the present case."

DOCTRINE NOT PECULIAR TO NORTH CAROLINA.

The principle that a railroad corporation on acceptance of its charter (which was done in our case in the year 1855), enters into a contract with the sovereign, granting the charter to furnish reasonably safe carriage for passengers and to its employees, was announced by Chief Justice Shaw, in the case of McElroy v. Nashua, etc., R. Co., 4 Cush., 400, and repeatedly received the sanction of the Supreme Court of the United States, and of leading Courts of the different States.

Railroad v. Barron, 5 Wall., 90, 104.
Thomas v. Railroad, 101 U. S., 83.
Nelson v. Vermont, etc., R. Co., 26 Vt., 717.

The Chicago, etc., R. Co., v. McCarthy, 20 Ill., 385.
Ohio, etc., R. Co., v. Dunbar, 20 Ill., 623.
Chicago, etc., R. Co., v. Whipple, 22 Ill., 105.
35 Am. St. Rep., 302, and notes.

The learned Chief Justice, in McElroy v. Railroad, *supra*, took the ground that where the personal action was brought for damages for killing a decedent by a personal representative, the plaintiff had his election to sue for a tort or to bring his action for the breach of contract, upon the idea that its benefits inured to the passengers as well as to the State.

In Railroad v. Winans, 17 How. (58 U. S.), 30, the Court said, in discussing the question of the power of a corporation to rid itself of its obligation to the State, which created it:

"This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchise were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their inefficiency provided as a remuneration to the community for their grant. The corporation can not absolve itself from its obligations without the consent of the Legislature. Beman v. Buford, 1 Simon N. S., 550; Minch v. B. and L. Railway Co., 13 L. and E., 506; James v. Railroad Co., 121 N. C., at page 529."

The "Southern" had notice of these statutes quoted above and of the State construction of them when it bought in 1893, as the bondholders had in 1884, and is pre-

sumed to have known that is was necessary to form a domestic corporation under the State statutes in force before the bonds were issued, the plan of reorganizing under a new charter having been previously approved in Gooch v. McGee, 83 N. C., 664, and in Kendrick v. Railroad, 101 N. C., 620; Bass v. Nav. Co., 111 N. C., 446; Von Glahn v. Derossett, 81 N. C., 467.

THE FEDERAL COURTS SHOULD BE GOVERNED BY THE DECISIONS OF THE STATE COURT.

The decision in Aycock v. Railroad, *supra*, rendered in 1883 (before the mortgages were executed), followed by the series of adjudication already cited, should, according to the current of authority, be followed by the Federal Court.

"It is undoubtedly a question of local policy with each State what should be the extent and character of the powers which the various political and municipal organizations shall possess, and the settled decision of the highest Court on this subject will be regarded as authority by the Courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State."

Claiborne v. Brooks, 111 U. S., 410.
Fall Brook Irrig. Dist. v. Bradley, 164 U. S., 112.
Leeper v. Texas.

If this exception is intended to raise the question of liability of the lessor, we can only repeat what we said before, "That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road, is well settled in this State." Aycock v. Railroad, 89 N. C., 321, 330; Logan v. Railroad, 116 N. C., 940; Tillett v. Railroad, 118 N. C., 1031, 1043; James v. Railroad, 121 N. C., 523, 528; Benton v. Railroad, 122 N. C., 1007, 1009; Norton v. Railroad, 122 N. C., 910, 937; Pierce v. Rail-

road, 124 N. C., 83, 93; Perry v. Railroad, 128 N. C., 471, 473; Raleigh v. Railroad and Harden v. Railroad, at this term.

Perry v. Railroad, 129 N. C., at page 332.

The Supreme Court of North Carolina had not had the authority to construe its own Constitution and laws, free from the right of review, except by writ of errors in certain cases, and its rulings were entitled to respect on the part of the Federal Court.

In Aycock v. Railroad, at the October Term, 1883, nearly a year before the first or second mortgage bonds were executed in September, 1884, the Supreme Court of North Carolina had held, that a railroad company *permitting another company to use its road*, was responsible for the negligence of the latter resulting in death or injury to passengers.

In James v. Railroad, the Court held that the Southern Railway Company, a corporation of Virginia, as such could not own the franchise of a railroad company incorporated by the State of North Carolina without the express consent of the State, which had not been given; second, that the statutes authorizing the mortgage construed, with other statutes in force when the mortgages were executed, required that a purchaser at a foreclosure sale should proceed to organize a domestic corporation, and until such purchaser so organized, it would operate the railway, by consent of the mortgagor, and would occupy the same position as a lessee or licensee, and, that it was settled law in North Carolina that a domestic railroad corporation could not absolve itself from liability for the culpable negligence of a foreign company, operating its road as a lessee, except by the express assent of the State of North Carolina to such execution.

In Harden v. Railroad, 129 N. C., at page 359.

Logan v. Railroad, *supra*, has been cited and approved

on this point. Tillett v. Railroad, 118 N. C., at page 1043; James v. Railroad, 121 N. C., 528; Norton v. Railroad, 122 N. C., at page 937; Benton v. Railroad, *Ibid.*, at page 1009; Pierce v. Railroad, 124 N. C., at page 93; Perry v. Railroad, 128 N. C., at page 473, and in Raleigh v. Railroad, at this term, in most of which cases this defendant was a party.

In 20 Am. and Eng. R. R. Cases, Annotated, at page 847, the rule is laid down: "A railroad company which has leased its road, cars and engines, and allows the lessee company to operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee, and for defects in the construction and maintenance of the road and its equipments, unless there is a statutory provision to the contrary" (and there is none in this case). For this proposition it there cites thirty-six cases from the United States Courts and the Courts of the different States, and from England, and it is not necessary to repeat them here. In Railroad v. Brown, 84 U. S., at page 450, the Court says: "It is accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessee does not change the relations of the original company to the public," and cites with approval Redf. Railways to same effect. Also the same purport are I Beach Pr. Corp., sec. 366; I Spelling Pr. Corp., 145, and several other authorities cited in Logan v. Railroad, 116 N. C., at page 946, *et seq.*

The petitioners deny the authority of the Federal Court:

First. To grant the corporation.

Second. To review and reverse the ruling of the State Court instead of following constructions of the State laws made before the mortgage debts were enacted.

Third. To declare unjust and oppressive the statutes of

North Carolina in reference to selling the franchise and property of railroad company, that had been enacted many decades before the mortgage debts was enacted, and which had been re-enacted as a part of The Code in 1883, a year before the date of the mortgages. (See record, page 204.)

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